United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. [redacted] 23918

UNITED STATES OF AMERICA, Appellee

v.

GORDON P. METTS, Appellant

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

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ISSUES PRESENTED

1. Whether the search of appellant's automobile could possibly be justified as either a reasonable search incident to a lawful arrest or a search based upon probable cause.

2. Whether as a matter of law appellant's possession of license tags four to six months after they were stolen could give rise to the inference that he stole them.

3. Whether appellant was prejudiced by denial of a motion to sever the two counts of the indictment.

(This case has not previously been before this court.)

References to Rulings - None

Statement of the Case

On October 25, 1968, appellant Gorden P. Metts was charged with a two count indictment of carrying a pistol without a license (D.C. Code § 22-3204) and petit larceny of automobile tags (D.C. Code § 22-2202). A jury trial was held on October 27, 1969 and appellant was found guilty of both counts. He was sentenced on January 15, 1970, to a term of one year on the petit larceny count and, since the carrying of a pistol without a license was subsequent to a conviction for a felony, he was sentenced to a term of two to six years. The sentences were to run concurrently with each other and concurrently with any time remaining to be served with the prior felony count. On January 21, 1970, appellant filed a Notice of Appeal and was granted leave to appeal *in forma pauperis*.

The incidents leading to appellant's arrest on these charges began shortly after midnight on October 25, 1968, when appellant was driving his 1962 Cadillac automobile in the District of Columbia on his way to work at Freedmen's Hospital. He was observed by two officers, Spencer W. Scott and Curtis Ziegler, both of the Metropolitan Police Department, who were riding in a marked police car. The officers

observed appellant for several blocks on 11th Street, N.W., between the 1100 and 1700 block of Vermont Avenue (Tr. 5, HM2)[1/] and estimated his speed as 40 miles an hour. The officers stopped appellant in the lane closest to the curb at the intersection of 11th Street, N.W., and Vermont Avenue (Tr. 9 , HM2). Officer Scott stepped out of his vehicle, approached appellant and told him, "he was driving 40 miles an hour in a 25 mile speed zone" (Tr. 10, HM2) and asked him for his driver's license and registration.

Appellant voluntarily stepped from his automobile, patted his hip pockets and then went to the trunk of the car and searched in there. Officer Scott again asked appellant if he had a permit and appellant replied that he did not. (Tr. 10, HM1; Tr. 10, HM2; Tr. 31, T.). The officer then told appellant that he was under arrest and conducted a search of his person which revealed nothing (Tr. 11, 16, HM1; Tr. 31, T.).

1/ References to transcripts of the hearings and the trial will be abbreviated in this brief as follows:

Tr. __, T. = Trial on October 27, 1968.

Tr. __, HM1 = Hearing on Motion to Suppress Evidence and on Motion for Relief from Prejudicial Joinder, on February 28, 1969 (Continued).

Tr. __, HM2 = Hearing on Motions on October 24, 1968.

Officer Ziegler had stepped out of the police vehicle and approached the parties. Appellant accompanied Officer Ziegler back to the police cruiser and remained with him (Tr. 31, T.). Officer Ziegler called for a cruiser or wagon, but did not have any information regarding ownership of the license tags at that time. (Tr. 12, 19, HM1)

Officer Scott took a flashlight (Tr. 35, HM1), went to appellant's automobile and leaned inside the front door on the driver's side (Tr. 13, 24, HM2). Using his flashlight (Tr. 36, HM1), while "looking in looking around," he observed a pistol "partly covered by a blanket" in the space between the two front seats (Tr. 33, T.). The officer stated that he did not know what part of the pistol was showing. (Tr. 14, HM2; Tr. 33, T.). The officer then picked up the pistol, walked back to appellant, told him he had the gun and "advised him of his constitutional rights." (Tr. 16, HM1). When the police transport arrived, appellant was again searched and bullets were removed from his clothing. (Tr. 41, T.).

Investigation of the license tags revealed that they had been stolen and appellant was also charged with larceny of the tags. The tags had been on an automobile which had

been demolished in an accident in April, 1968, and left on a gas station lot by the owner who gave instructions to an attendant to dispose of it. The owner testified at trial that he had learned of theft of the tags in June, 1968, when he received a parking violation summons, and had notified the police at that time. (Tr. 46-49, T.)

Appellant prior to trial moved for relief from prejudicial joinder of the two counts of the indictment and for suppression of the evidence of the pistol and of the tags. A hearing on these motions was held on February 28, 1969, and continued. A second hearing was held on these motions on October 24, 1969. The motion to suppress was denied on that date and the motion for relief from prejudicial joinder was denied prior to trial. At trial the pistol was introduced into evidence over appellant's objection (Tr. 44, T.).

At the close of the government's case, appellant made a motion for acquittal which was denied. At the close of all the evidence, the motion for a judgment of acquittal was renewed and again denied. After a jury verdict of guilty on both counts, appellant requested a judgment of acquittal notwithstanding the verdict and this was denied.

ARGUMENT

I. THE SEARCH OF APPELLANT'S AUTOMOBILE RESULTING IN DISCOVERY OF THE PISTOL WAS NOT A REASONABLE SEARCH INCIDENT TO AN ARREST AND WAS WITHOUT PROBABLE CAUSE.

1. The search which produced the gun was not a search made incident to an arrest.

Appellant was initially arrested for speeding[2/] and for driving without a permit. There is authority that a person arrested for a traffic violation may be frisked for the protection of the arresting officer. See, Terry v. Ohio, 392 U.S. 1, (1968). However, inasmuch as this initial frisking revealed nothing, it is not here in dispute.

The case is entirely different, however, where the appellant was under arrest, had been frisked, and was in custody away from his automobile. The search of the automobile at that time cannot be justified as a search incident to an arrest. As the court said in Preston v. United States, 376 U.S. 364, 367 (1964):

2/ The fact that appellant was found innocent of the speeding charge in a trial without a jury in the Court of General Sessions for the District of Columbia on November 6, 1968, (Criminal Action Nos. D.C. 38919-68 E & D) does not destroy probable cause for the police stopping him since the police may stop any motorist to ascertain whether he possesses a permit, D.C. Code § 40-301(c)(1967), Mincy v. District of Columbia, 218 A.2d 507 (D.C. App., 1966) and there was no evidence that the stopping was for ulterior purposes. Id. Cf. Buick v. United States, 396 F.2d 912 (9th Cir. 1968).

> The rule allowing contemporaneous searches is justified . . . by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime--things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest. Once an accused is under arrest and in custody then a search made at another place, without a warrant, is simply not incident to the arrest. [citing Agnello v. United States, 269 U.S. 20, 31 (1925)]

The same conclusion was reached in Chambers v. Maroney, 38 U.S.L.W. 4547, 4548 (June 22, 1970) and in Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216, 220 (1968).

In each of those cases, the search of the automobile which the court found not incident to the arrest was conducted while the defendants were at the police station or in jail. But the same rational should apply no matter where the defendant is in custody provided that he is removed from the place that is being searched.

2. Even if the search were incident to the arrest, it was not a reasonable search.

Assuming arguendo that the search of the automobile was incident to the arrest, it was not a reasonable search. In Chimel v. California, 395 U.S. 752, 763 (1969), the court expressly limited the reasonableness of a warrantless search

to the defendant's person and the area in which he might have obtained either a weapon or destroyed evidence that might have been used against him. Under this opinion the search of an automobile when defendant is in custody and outside the automobile, can never be considered reasonable.

Prior to the Supreme Court's decision in Chimel, the search of appellant's automobile would have been reasonable if it could have been justified on the theory that it might reveal fruits or instrumentalities of the crime.[3/] Once appellant admitted that he did not have a permit, however, the subsequent search was clearly unreasonable. The court in Amador-Gonzalez v. United States, 391 F.2d 308 (5th Cir. 1968), held that in the absence of other circumstances, discovery of evidence of a "crime" of a traffic violation cannot be a reasonable purpose of a search incident to the arrest for the violation. The search of an automobile following a lawful traffic violation cannot be justified as a search for fruits of crimes or instrumentalities since there are "no fruits or instrumentalities of the 'crime' of unlawful parking, speeding, driving without a registration

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3/ United States v. Rabinowitz, 339 U.S. 56 (1950); Harris v. United States, 331 U.S. 145 (1947).

or license . . . . Since there are no fruits or instrumentalities of such a crime, there can never be a reasonable, incidental search, no matter how lawful the arrest." [quoting Judge Sobel, Search and Seizure (1964)]. Id. at 316-317.

3. There was no probable cause for the search.

A warrantless search may be justified regardless of its relation to the arrest if there was probable cause for the police to believe that evidence of crime was concealed in the automobile. Chambers v. Maroney, supra. However, there must be a reasonable cause for such a belief. As the Supreme Court said in Dyke v. Taylor Implement Co., supra, at 221:

> Automobiles, because of their mobility, may be searched without a warrant upon facts not justifying a warrantless search of a residence or office. Brinegar v. United States, 338 U.S. 160 (1949); Carroll v. United States, 267 U.S. 132 (1925). The cases so holding have, however, always insisted that the officers conducting the search have "reasonable or probable cause" to believe that they will find the instrumentality of a crime or evidence pertaining to a crime before they begin their warrantless search.

In Preston v. United States, supra, the court emphasized that searches of automobiles must "meet the test of reasonableness under the Fourth Amendment before evidence obtained as a result of

such searches is admissible. . . . [T]he test is, still, was the search unreasonable?" Id. at 366-67.

In the record of the present case, there is no showing at all that the arresting officer had probable cause to search appellant's automobile. By his own testimony, it was only his suspicion that appellant was speeding that caused him to stop appellant. This case is therefore an even more extreme example of an exploratory search without probable cause than those cases which found an absence of probable cause for stopping and searching an automobile of which the police were suspicious. See, e.g., Dyke v. Taylor Implement Co., supra; Preston v. United States, supra; Amador-Gonzalez v. United States, supra. There is no evidence in this record that the arresting officer suspected appellant to be involved in any offenses other than speeding and driving without a permit. There was no showing anywhere in the record of probable cause for the search of the automobile. "[A] search is not made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success." United States v. Di Re, 332 U.S. 581, 595 (1948).[4/]

4/ Since there was no probable cause for the exploratory search of the automobile, appellant does not find it is necessary to consider whether the police should have obtained a warrant for the search.

Furthermore, there is no evidence that the gun was at any time prior to the search within sight of the police officer making the arrest. The arresting officer testified that when he leaned into the automobile and looked around (Tr. 33, T.), he saw the pistol which was at least partially hidden by a blanket. Further, the fact that he used his flashlight during the search (Tr. 35-36, HM1) is affirmative evidence that the gun was not in plain view.

This case is therefore unrelated to a case where an officer in the normal course of his duties observes evidence of an offense, see Harris v. United States, 390 U.S. 234 (1968), and is distinguished from a case where a policeman inquiring about a driver's license or registration card, observes evidence in plain view inculpating the occupant of the car in a separate offense. See, e.g., Creighton v. United States, __ U.S. App. D.C. __, 406 F.2d 651 (1968); Wright v. United States, __ U.S. App. D.C. __, 404 F.2d 1256 (1968).

Therefore, the arresting officer had no reason to search appellant's automobile and would not have discovered the pistol in the absence of such a search.

On the basis of the facts of this case, we believe it clear that (1) the search which produced the pistol was not incidental to the arrest, (2) the search of the automobile by the police was not a reasonable search and (3) there existed no probable cause for such a search. Since the pistol would not have been discovered in the absence of this search, the denial of appellant's motion to suppress this evidence constituted reversible error.

II. APPELLANT'S POSSESSION OF THE STOLEN TAGS DID NOT AS A MATTER OF LAW SUPPORT AN INFERENCE THAT HE STOLE THEM.

As a general rule in larceny cases, exclusive, unexplained possession of stolen property shortly after the commission of a larceny may justify an inference which permits the jury to conclude that the possessor is guilty of larceny, provided all of the other elements of larceny are proved beyond a reasonable doubt. However, this inference is permissible only if "the accused is found in exclusive possession of property recently stolen and the possession could not be otherwise explained." Pendergrast v. United States, __ U.S. App. D.C. __, 416 F.2d 776, 787 (1969). Accordingly, in the cases where the inference has been permitted, the stolen property was found in defendant's

possession within hours or days of the theft. Smith v. United States, 118 U.S. App. D.C. 235, 335 F.2d 270 (1964) (automobile stolen and seen in defendant's possession the same day as the theft); Bray v. United States, 113 U.S. App. D.C. 136, 306 F.2d 743 (1962)(stolen automobile in defendant's possession six days after theft); Tractenburg v. United States, 53 U.S. App. D.C. 396, 293 F. 476 (1923)(defendant possessed automobile the day following the theft). Edwards v. United States, 78 U.S. App. D.C. 226, 139 F.2d 365, cert. denied, 321 U.S. 769 (1944)(property stolen from store found in defendant's possession one week later); Jackson v. United States, 146 A.2d 577 (D.C. App. 1958) (marked bill from theft of money found in defendant's wallet the next day).

The only District of Columbia case revealed by our research where possession of evidence more than a week after a theft permitted the inference is Travers v. United States, 118 U.S. App. D.C. 276, 335 F.2d 698 (1968), where a stolen car was found in defendant's possession two months after it was taken. The court in Travers in allowing the inference also noted that "the longer the interval [between theft and

discovery of possession] the weaker the inference." 118 U.S. App. D.C. at 280, 335 F.2d at 702.[5/]

In the present case the automobile tags were left on a demolished car in April, 1968. The owner learned of their theft in June. They were found in appellant's possession at the end of October, 1968, which was at least four months and as much as six months after their theft. Clearly, that period of time is too great to give rise for reasonable inference that appellant stole the tags when there is no other evidence linking appellant to their theft and there are many other possible events which could have led to their possession by appellant in October. Therefore the "factual prerequisites" supporting a "logical deduction that possession of the stolen property could have been acquired only by the possessor's theft of that property" were not established. Cf. Pendergrast v. United States, supra at 787.

Because no reasonable inference of theft could be drawn from appellant's possession of the tags four to six

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5/ Even though Travers involved a much shorter period of time and can therefore be distinguished from the present case on that ground, it is also distinguishable in the kind of property that was taken. It would be difficult for an automobile to pass through several different hands while license plates easily could have been sold or even found by various people before coming into appellant's possession.

months after their disappearance, the factual prerequisites for the inference were lacking, and, therefore, the jury should not have been permitted to consider this inference. For these reasons appellant's motions for acquittal at the close of the government's case or at the close of all of the evidence should have been granted. Once the jury reached its verdict on the basis of an improper inference, the motion for judgment notwithstanding the verdict should have been granted.

III. DENIAL OF THE MOTION TO SEVER THE TWO COUNTS OF THE INDICTMENT RESULTED IN PREJUDICIAL ERROR.

1. Under Rule 8 the joinder was in and of itself prejudicial.

FED. R. CRIM. P. 8(a) permits joinder of offenses if "of the same or similar character of [when] based on the same act or transaction or two or more acts or transactions connected together or constituting parts of a common scheme or plan." While it has been said that "any form of misjoinder not permitted by . . . Rule [8] . . . is conclusively presumed prejudicial," J. MOORE, FEDERAL PRACTICES, ¶ 8.02 [1] at 8-4 (Cipes ed. 1967), this court in Baker v. United States, 401 F.2d 958, 974

(1968), has applied the harmless error rule "where it is clear no prejudice from the joinder could have occurred."

It is evident from the record that the larceny of the tags, which occurred in April or the early summer, and the felony for possession of a weapon which occurred in October were neither "of the same character," nor "based on the same acts or transactions" nor "constituting parts of a common plan or scheme." In fact, if a separate trial had been ordered, none of the facts required to prove the elements of either crime would have been permitted to be introduced at the trial of the other.

Although this court disagreed with the proposition that a violation of Rule 8 may never be deemed harmless, it found that the joinder of unrelated offenses committed by separate defendants in the same trial in violation of FED. R. CRIM. P. 8(b) is "in itself . . . prejudicial, and it would be inappropriate to speculate as to the extent to which that evidence may have affected the deliberations of the jury or embarrassed the defendant in presenting his defense." Baker, supra, at 973, 974. Misjoinder results because the introduction of evidence tending to prove the elements of the offense of each defendant is not relevant to the guilt of the other. Ibid.

Appellant maintains that it is the same case when totally unrelated offenses are improperly joined under Rule 8(a); that is, when the facts necessary to prove each separate offense are in no way relevant to the other offense.

2. The record clearly demonstrates that the joinder did prejudice appellant's case.

Notwithstanding appellant's position that misjoinder was prejudicial "in itself," appellant was nevertheless prejudiced. As indicated on page 15, infra, this court has held that misjoinder under Rule 8 is not in and of itself prejudicial, and the harmless error rule would be applied "where it is clear no prejudice from joinder could have occurred." Baker, supra, at 974. It is evident from the record in this case that it is not "clear" that no prejudice could have occurred from the joinder. Indeed, the record indicates that the appellant was in fact prejudiced by the joinder.

According to the leading case of Drew v. United States, 118 U.S. App. D.C. 11, 331 F.2d 85 (1964)

> The argument against joinder is that the defendant may be prejudiced for one or more of the following reasons: (1) he may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the

> crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find. A less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one.

It may be contended that the government "might be able to present the evidence in such a manner that . . . the jury will be able to treat the evidence relevant to each charge separately" in an attempt to avoid fatal prejudice. Drew, supra, at 92. The record clearly demonstrates that this was not the case here; government made little effort to compartmentalize its case to the jury. This was especially evident in the government's closing argument which probably served to confuse and confound when the jury attempted to distinguish between the direct evidence presented by the government in the felony charge and the circumstantial evidence which required an inference which was at best very weak in the misdemeanor charge.

The government frequently switched from discussion of the gun and bullets to the tags, back again to "control

of the gun" and then again to the tags. (Tr. 77, T.). Throughout its summation, the government insisted upon dealing with the charges interchangeably. Further, the government combined each of defendant's explanations with respect to both charges under the misleading umbrella "victim of circumstances" (Tr. 78, T.). Whether the jury believed appellant was actually a "victim of circumstances" in his possession of the tags has no relevance to the simple and distinct question whether he was to be believed in his explanation for the possession of the weapon. Further, his explanation as to the weapon should not be used to impugn his explanation for the tags. By combining the testimony in this fashion, the government in fact argued that the jury should disbelieve all of defendant's explanations if it did not find one of the "victim of circumstances" defenses credible.

Finally, the prosecution gets to the crux of his problem (Tr. 79, T.):

> ". . . do you believe, one, that he innocently came by those tags, and if you believe that he innocently came by those tags, do you want to add on to it a belief that he was driving up and down the street in an automobile with a pistol next to him and he didn't know it was there . . . [and] that he had the five bullets which fitted that gun in his pocket and he didn't know they were there."

This is clearly an improper cumulating and mixing of evidence on separate and distinct charges and reversible error.

In conclusion, the holding in Drew compels reversal:

> "If separate crimes are to be tried together . . . both court and counsel must recognize that they are assuming a difficult task the performance of which calls for a vigilant precision in speech and action far beyond that required in the ordinary trial . . . we cannot say the jury probably was not confused or probably did not misuse the evidence . . . ." 331 F.2d at 94.

3. The fact that "concurrent sentences" are involved is no bar to consideration of appellant's claim of prejudicial misjoinder.

In Baker, supra, at 986, this court indicated that concurrent sentences may render even an improper joinder harmless error if the conviction with the longer penalty is sustained, since it could be maintained that there is no requirement to reopen the other conviction, citing Hirabayshi v. United States, 320 U.S. 81 (1943). Hirabayshi has recently been severaly limited, if not overruled, by Benton v. Maryland, 395 U.S. 784 (1969), where the court held that, due to the possible adverse collateral effects of criminal convictions, the imposition of concurrent sentences does not bar consideration of challenges to multiple convictions.

Therefore, on the question of concurrent sentences, Baker should no longer constitute good law. The Supreme

Court explained that it is not adhering to Hirabayshi because there is no satisfactory explanation for a bar to be raised when concurrent sentences are involved, 395 U.S. at 789, and additionally, "most criminal convictions do in fact entail adverse legal consequences." Benton, supra, at 790, quoting Sibron v. New York, 392 U.S. 40 (1968).

Moreover, if this court should reverse either conviction or order a new trial for either charge on grounds other than misjoinder, it is clear that any bar that may have been appropriate if weight were given to the concurrent sentences would have no application anyway, and the court would have to order a new trial on both charges.

In view of the foregoing, appellant maintains that (1) the joinder under the two counts of the indictment was in and of itself prejudicial, (2) the record clearly demonstrates that the joinder did prejudice appellant's case, and (3) concurrent sentences are not a bar to consideration of appellant's claim of prejudicial misjoinder.

CONCLUSION

For the reasons stated, the convictions of carrying a pistol without a license and of petit larceny of automobile tags should be reversed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 23,948

UNITED STATES OF AMERICA, Appellee

v.

GORDON P. METTS, Appellant

Appeal from the United States District Court
for the District of Columbia

APPELLANT'S REPLY BRIEF

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*/ Cases and authorities chiefly relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS
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Appeal from the United States District Court
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APPELLANT'S REPLY BRIEF

ARGUMENT

I. THE PISTOL WAS NOT IN PLAIN VIEW AND DID NOT COME INTO VIEW OF THE OFFICER UNTIL HE BEGAN HIS ILLEGAL SEARCH.

The uncontested facts in this case, based on the testimony of the police officers in the pre-trial hearings and at trial, are that one police officer held appellant in custody on the traffic offense charge in the patrol

car at a distance from appellant's own automobile, and the other officer walked over to appellant's car and, after looking around, found the pistol.

Appellant contends that this conduct constituted an illegal search. The Government attempts to skirt this issue by conjecturing as to facts admittedly not in evidence and relying on hypotheticals factually irrelevant to the case before this Court.

The Government first states that the "officer went to inspect the car prior to removing it from the scene." (Appellee's Brief at 5). There is no evidence in any of the transcripts as to what the intention of the officer was when he searched, or "inspected," the automobile; and there is no evidence indicating that the "inspection," or search, was preliminary to removing the car from the street.

Assuming arguendo that this was the intention of the officer, the Government is able to offer no authority for its assertions that the officer had a responsibility to look inside the car "since the driver of that car was under arrest for failure to have an

operator's permit," and that the officer had to drive the car or have it towed to the precinct. (Appellee's Brief at 5-6). There is no evidence that the car was in a no-parking zone or that it was obstructing traffic. In fact, the evidence in the case is that the car was in the lane closest to the curb and that the time of arrest was shortly after midnight. The transcript does not reveal what finally happened to appellant's car. Despite the omissions in the transcript on this point, the Government is now asking this Court to hold that the police have the right to tow away and impound an automobile any time they arrest the driver for driving without a permit. Appellant contends that one who has been charged with driving without a license should have the opportunity to arrange to have his own property removed from the street by someone else unless the location is such that the traffic is obstructed. But that issue is not before this Court. The issue is the legality of the search by the officer under circumstances which actually occurred.

The Government does not focus on the events which actually occurred. In apparent support of its argument that the police had the right to look for the pistol, the Government states, "if appellant had remained in the car while Officer Scott questioned him, the subsequent viewing of the pistol next to the driver's seat would have been proper." Appellant fails to see the relevance of this hypothetical which is neither a recitation of nor analogous to events which actually occurred.

The Government, however, probably believes that this hypothetical case is relevant because it appears to contend that the plain view doctrine justifies a search when an object comes into plain view of the officer after the search is illegally begun.[1/] It

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1. Appellant does not quarrel with the doctrine that an officer may seize any evidence which he happens to observe in the normal course of his duties. Appellant discussed this doctrine at page 10 of his main brief, explaining why it is not relevant to the facts of this case. The cases cited by the Government in its brief as support for the plain view doctrine do not add anything to the doctrine as discussed by appellant.

states that appellant is arguing "that one can avoid the effect of the plain view doctrine simply by removing himself from that area which an officer is about to view in the performance of his duties." What appellant does state is that, while complying with the directions of a police officer, he stepped from his automobile; and since the police officer no longer had any reason to look there the subsequent "inspection" was an illegal search. See Amador-Gonzalez v. United States, 391 F.2d 308 (5th Cir. 1968). The Government appears to contend that because the officer might otherwise have been able to look there, his actual "inspection" was not a search, because if he had been able to inspect that area anything he saw would have been justified under the plain view doctrine.

The Government also relies on the plain view doctrine when it argues that the doctrine would have applied if the officer had happened to see the gun while removing the automobile from the street. Appellant fails to see the relevance of this conjecture since

this Court must decide the legality of the actual search by the officer, not what might have happened. See United States v. Thweatt, U.S. App. D.C., No. 22,772 (June 30, 1970) (slip op. at 3).

The Government does not argue that the police had a right to search the automobile for their own protection or for instrumentalities of the offense. Cf. Chimel v. California, 395 U.S. 752, 763 (1969). The Government's only response is to attempt to justify the conduct of the officers on the basis of what could have happened subsequent to or instead of the events that actually occurred.

Appellant submits, therefore, that this Court cannot, consistently with the facts which did occur, uphold the seizure of the pistol on the ground that it was in plain view, and since there was no legal basis for the search that produced the pistol, the trial court should have excluded the pistol and testimony concerning it as the fruits of an illegal search.

II. THE INFERENCE THAT APPELLANT STOLE THE LICENSE TAGS WAS TOO WEAK TO GO TO THE JURY.

The Government contends that, although the length of the interval from the time property is stolen until the time it is recovered may weaken the inference that the possessor stole it. Travers v. United States 118 U.S. App. D.C. 235, 335 F.2d 270 (1964), it does not remove the inference from the jury. This contention is in conflict with the language of this Court describing the criteria for use of the inference Pendergrast v. United States, 135 U.S. App. D.C. 20, 416 F.2d 776, cert. denied 395 U.S. 926 (1969). The inference that one in possession of stolen property is also the thief is permissible only if "the accused is found in exclusive possession of property recently stolen and the possession could not be otherwise explained." Id. at 787 (footnotes omitted). If, as in this case these factors are not present, it was error for the trial judge to instruct the jury that it was permitted to consider the inference.

Appellant was found in possession of stolen license plates which had been on a demolished car left on a service station lot and removed from the car four to six months prior to discovery in appellant's possession. Because of the easily transferable nature of the plates and the easily accessible location of the plates prior to their theft, appellant's possession four to six months later, without any other evidence linking him to the removal of plates from the car, does not support a "logical deduction that possession of the stolen property could have been acquired only by the possessor's theft of that property." See Pendergrast v. United States, supra at 787.

This case is quite different from United States v. Johnson, U.S. App. D.C., No. 22,311 (Sept. 4, 1970), in which this Court held that defendant's possession of the engine of one automobile five weeks after its theft and of the body of another car nine months after it had been taken was a sufficient basis for the instruction on the inference of guilt drawable from possession of recently stolen property. The Court noted

in Johnson that the car which had been missing for nine months had been observed on a lot behind Johnson's place of abode sometime prior to Johnson's arrest. Furthermore, the circumstances of that case "bespoke a substantial relationship to the properties" shared by the two defendants, "a relationship of a type not matched by anyone else." Id. at 10. Johnson's "relationship to the properties" consisted of assembling an automobile composed of parts of stolen automobiles. The evidence showing this, coupled with the fact that the stolen car had been behind Johnson's home, added significant factors to the case, buttressing an otherwise very weak inference.

In this case, there is no additional evidence linking appellant to the license tags from the time of their removal until they were found four to six months later in appellant's possession. Appellant's possession alone months after the theft did not create logical inference that he stole the plates; therefore, the jury should not have been instructed that it could consider the inference.

III. DENIAL OF THE MOTION TO SEVER THE TWO COUNTS OF THE INDICTMENT WAS PREJUDICIAL.

1. There was misjoinder under Rule 8(a)

Appellant maintains, and the Government apparently agrees that before the question need be reached whether severance is required under Fed. R. Crim., P. 14, this Court must first find that joinder was proper under Fed. R. Crim., P. 8(a). "There are really two issues here . . . first, whether the joinder was permissible under Rule 8(a), and second, whether, assuming proper joinder, severance was required under Rule 14. . . ." Brief for Appellee at 8 (emphasis added). The issue at bar, then, narrows to whether or not the two offenses were misjoined under the criteria of Rule 8(a).

The Government argues that both offenses were "based on the same act or transaction . . . namely the operation of the Cadillac by appellant." Ibid. The Government bases its contention upon the argument that the automobile could not be on the street without the tags, and the offense of carrying a pistol without

a license was connected to the automobile's being on the street, apparently because the pistol was in the automobile. The Government offers no authority to support the connection it sees between the two offenses. Appellant does not see how the incident of operating the car serves as the logical nexus for these two unrelated offenses, which occurred months apart, making them a part of one transaction.

The Government's conclusion appears to be a result of its confusion of the test under Rule 8, that "the offenses charged . . . are based on the same act or transaction," Fed. R. Crim., P. 8 (emphasis added). The relevant consideration is the alleged offenses rather than the activity of the accused at the time of his arrest. Accordingly, in determining whether joinder was proper under Rule 8, the Courts have never examined only the defendant's activity at his arrest to determine if the offenses arose from one act or transaction. See e.g., Baker v. United States, 131 U.S. App. D.C. 7, 401 F.2d 958

(1968); Daly v. United States, 119 U.S. App. D.C. 353, 342 F.2d 932 (1964), cert. denied, 382 U.S. 853 (1965); Drew v. United States, 118 U.S. App. D.C. 11, 331 F.2d 85 (1964). By the Government's reasoning, one charged with unauthorized use of an automobile could be tried for murder at the same time if evidence linking him to a murder were found in the car at the time of his arrest, since this would be one act or transaction.

In the alternative, the Government argues that any misjoinder was "cured by the verdict" because it maintains that appellant's motion in the District Court was based on prejudicial joinder. (Appellee's Brief at 9.) Accordingly, the Government relies on Franklin v. United States, 117 U.S. App. D.C. 331, 330 F.2d 205 (1963). In Franklin, however, the appellant failed to attack the indictment in limine or even during trial. Appellant's motion for relief from prejudicial joinder, filed with the District Court January 6, 1969, included the argument

that the two counts were misjoined.[2]

Furthermore, the misjoinder in this case could not have been "cured" by the verdict; the verdict was a result of the misjoinder.

2. The misjoinder was not harmless error because it was prejudicial to appellant.

Even though Rule 8(a) requires that separate offenses not be misjoined, there must be an examination as to prejudice in order to determine that the misjoinder does not constitute harmless error. Baker v. United States, supra at 973. The prejudice in this case is obvious. The prosecutor's combined use of the evidence relating to each separate offense resulted in inevitable prejudice of the type which the court was concerned with in Drew, supra. Appellant does not feel it is necessary to repeat the

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2. Appellant requested the District Court to sever the counts of the indictment because the two offenses as charged occurred at different points in time and because joinder of the two counts could be prejudicial to the defendant, thus making timely motion for relief and apprising the court of the prejudice.

discussion at pages 16-19 of his main brief in which he explained how the prejudice outlined in Drew occurred in this case.

Appellant deems it necessary to add to this discussion the recent opinion in United States v. Bussey, U.S. App. D.C., No. 22,919 (July 21, 1970). In that case, which involved trial on a robbery charge, the prosecutor introduced evidence of defendant's participation in another robbery shortly after commission of the robbery to reput his alibi testimony. The witness' testimony as to the other robbery was not limited to rebuttal, but included details of crime. This Court compared that situation to the admission of evidence of prior convictions for impeachment purposes.[3/] In the Luck-Gordon situation, "the jurors are asked to doubt a defendant's veracity on the basis of the simple documentary

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3. See Gordon v. United States, 127 U.S. App. D.C. 343, 346, 383 F.2d 936, 939 (1967), and Luck v. United States, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965).

record of a prior conviction for which he has already 'paid his debt to society,' while in the present situation, they were presented with the full details of a criminal act for which the defendant had not yet been convicted or punished." Id., at 4. This Court reversed holding that the probative value of the evidence was less than the prejudice resulting from the likelihood that it would cause the jury to draw the 'improper influence' that appellant had a "disposition to commit crime." Id. at 7 (quoting at 5 from Drew v. United States, supra note 3, at 5). The holding of this case is a further illustration of why the evidence of the two offenses in the present case was not harmless error.

Appellant further adds that the confusion on the part of the Government in its contention that the operation of the Cadillac was the "act or transaction" on which the two offenses were based is an indication that the jury, when viewing two offenses for which appellant was arrested at the same time, could have become confused and either concluded that if appellant was guilty of

one, he was guilty of another, or could have cumulated the evidence of the two offenses to find appellant guilty of both. See Drew v. United States, supra at 88. The substantial probability that either of these situations occurred requires a finding that appellant was prejudiced by the joinder. Baker v. United States, supra. For this reason, the misjoinder of these two offenses cannot be viewed as harmless error.

3. The fact that "concurrent sentences" are involved is no bar to consideration of appellant's claim of prejudicial misjoinder.

This court in Bussey, supra at 11, n.26, settled the question that concurrent sentences will not bar consideration of prejudicial misjoinder. The Government apparently agrees that the issue is settled. Brief for Appellee, at 9, n.11.

CONCLUSION

For the reasons stated above and in appellant's main brief, the convictions of carrying a pistol without a license and of petty larceny should be reversed.

Respectfully submitted,

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